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EFILED
Executive Secretary
National Labor Relations Board
1099 14th Street, NW, Room 11602
Washington, D.C. 20570

Re: Request For Review of Compliance Determination
SEIU UHW–W (Lakewood Regional Medical Center)
Case No. 21-CB-015007 (358 NLRB No. 18)

This office is legal counsel to the National Union of Healthcare Workers ("NUHW'), the Charging Party in the above entitled matter. This letter shall serve as the NUHW's Request for Review of the General Counsel's Compliance Determination pursuant to Section 102.53 of the National Labor Relations Board Rules and Regulations.

The General Counsel affirmed the Regional Director's determination that "[i]n connection with the subject Board Order. . . that discriminatee Terrence Carter is not entitled to any backpay." In addition, the Regional Director determined that Carter would not have been reinstated to his former position of regular part time Electroencephalogram Technologist ("EEG Tech") with the Employer, or been able to be placed in any position with the Employer.

Specifically, the General Counsel erred in finding that the discriminatee Terrence Carter should have sought per diem work. The discriminatee was not offered per diem work due to his layoff and the Regional Director and the General Counsel are speculating that the discriminatee was not have accepted per diem work if offered.
Washington, D.C. 20570

I. INTRODUCTION

The NUHW's position is that it is a contractual requirement that laid off regular part time employees be offered per diem work available when the position was eliminated. The Region in footnote 3 states that it is a past practice. In addition, the Hospital and the Union admit that per diem work was available. [Footnote 4]. Moreover, the Hospital never offered the per diem work to Carter.

However, the Board relies on affidavit statements and testimony that Carter may not have accepted the per diem work. Neither the Hospital nor the Union explained the per diem work and what was required to Carter.

The only conversation regarding per diem work was from Carter's manager as set forth in Carter's affidavit as follows:

> "Neither the Employer nor Cordova told me that I could take a per diem position. My only conversation regarding per diem was with my supervisor Sam Soleymani, my clinical manager of cardiology department-the department where I worked. It was an off the record conversation regarding how he felt how I should go about things. He said he wanted to talk to me about the per diem situation based on his view. He said that he felt that I should accept the per diem position, work that position for a few months, and that I would be worked back into my regular position. My response was that due to how things played out, and how I was treated, that I would hurt me financially even if I was to consider a per diem position." [August 8, 2011].

Being reluctant about the possibility of a per diem position is not the same as refusing to take a per diem position. Carter was never offered a per diem position by the Hospital. The Union would not have processed a grievance on his behalf over the per diem position because the Union's position was that he was terminated. Further, the Region dismissed the Charging Party' charge against the Union for failing to processing his termination grievance.

During the compliance process, the compliance officer took an affidavit from Carter regarding the per diem work and the compliance officer added in the affidavit that Carter would not have taken the per diem work if it had been offered to him. In this affidavit, Carter was focused on the fact that he had been told that the per diem work was more than 2 times per week and that the Employer had sufficient work for a regular part time position. [June 26 , 2012].

With regard to the per diem work available, there is nothing in the compliance determination that demonstrates the number of hours worked by the Cardiology Techs that performed EEG Tech duties. There is no documentation that supports the assertion that there not enough work available for the EEG Tech position that caused the layoff. Moreover, the Region did not disclose that the Region determined the number of hours worked by the per diem EEG Tech. The Region simply asserts that it is irrelevant since Carter would not have accepted the per diem position. Once again the statement by Carter and its reliance by the Region is gratuitous, since Carter was never offered the per diem position by the Employer.

II. **FACTUAL BACKGROUND**

NUHW was in the process of organizing Lakewood Regional Medical Center ("Employer") which is currently represented by the SEIU. Terrence Carter was employed by the Employer for the

period of February 27, 2006 through July 31, 2010 as an EEG technologist in the bargaining unit represented by SEIU. Carter is a former shop steward for SEIU and was terminated as a shop steward under the trusteeship. In March of 2009, Carter delivered to Mary Okuhara, the Director of Human Resources for the Employer over 100 dues check off revocation forms to stop payroll deductions of dues for SEIU including his own. Since that time he has manually paid his dues by check to SEIU.

On June 30, 2010 Carter was summoned to a meeting with human resources , the cardiology clinic manager and the chief financial officer and he was told that his position was going to be eliminated due to low volume. Thereafter, Carter contacted the SEIU union representative Cory Cordova and informed him by voicemail that he wanted to file a grievance regarding the layoff. Cordova called Carter back 7- 14 days later and said that there was no grievance but that there would be effects bargaining over the elimination of Carter's position. Carter emailed Cordova to follow up regarding the effects bargaining. On July 18, 2010, Carter approached Cordova in the cafeteria and complained about SEIU's failure to follow up with effects bargaining. Carter reminded Cordova that his job was being eliminated on July 31, 2010. On July 30, 2010, Carter received a letter from his Employer that SEIU that demanded that he be terminated from his Employer for nonpayment of dues. In response to the letter, Carter requested that Cordova file a grievance over his termination. Cordova and SEIU responded to his request. SEIU never informed Carter of his rights under the collective bargaining agreement including the Hospitals obligation to inform him of per diem work or job opportunities at other Hospital facilities. The contract has very specific language regarding the elimination of positions and the employer's duty to make best efforts to avoid layoffs.

Carter has sent several letters to SEIU regarding the calculation of his dues. Carter has made payments and never received a breakdown of the amounts that SEIU claims he owes. The NLRB conclude the union violated Section 8(b)(1)(A) and (2) of the Act by seeking and obtaining the discharge of represented employee Carter . . . for failure to tender to the Respondent Union dues. . . , without providing to him the means of calculation
of his arrearages including a statement of the precise amount and months for which dues are owed and of the method used to compute this amount or adequately advising him of his obligations before his discharge was sought or obtained." ***Service Employees International Union, United Healthcare Workers–West (Lakewood Regional Medical Center),*** *358 NLRB No. 18 at 12 (2012).*

The Region had previously dismissed the allegations in the charge that alleging violations of Section 8(b) (1) (A) and (b)(5) of the Act for failing to process Carter's grievance regarding the layoff. The Charging Party's position was that SEIU failed to bargain over the elimination of Carter's position and or accept his grievances because of his support for NUHW. Due to the unlawful termination, it was futile for Carter to contact SEIU regarding his rights under the contract regarding the layoff including his right to per diem work.

III. ARGUMENT

1. The General Counsel Has Erred In Its Application of the Mitigation Doctrine.

Here, Terrence Carter was ordered reinstatement and backpay in accordance with the Boards' decision in F. W. Woolworth Company, 90 NLRB 289 (1950). The General Counsel affirmed the Regional Director's determination that Carter is not entitled to reinstatement and backpay. The Charging Party disputes the denial of backpay with regard to the determination that Carter would not have accepted per diem work that was never offered to him.

In *International Brotherhood of Teamsters, Local 727,* 2013 NLRB LEXIS 498 (July 2013), the ALJ stated as follows:

> "The finding of an unfair labor practice is presumptive proof that some backpay is owed. *Beverly California Corp*., 329 NLRB 977, 978 (1999). The General Counsel's burden in backpay cases is to show the amount of gross backpay due the claimant. *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993); *Mastro Plastics Corp*., 136 NLRB 1342, 1346 (1962). In demonstrating the gross amounts owed, the General Counsel need not show an exact amount; a reasonable approximation is sufficient. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 36 (1992), enfd. sub nom. *NLRB v. Heavy and Highway Const. Workers Local Union No. 158*, 952 F.2d 1393 (3d Cir. 1991) . Once the General Counsel shows the gross amounts owed, the burden shifts to the Respondent to show interim earnings [*17] or other facts that negate or mitigate its liability. *Hansen Bros. Enterprises*, supra; *Mastro Plastics Corp*., supra. In this process, the backpay claimant should receive the benefit of any doubt rather than the respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. *Performance Friction Corp*., 335 NLRB 1117, 1131 (2001); *La Favorita, Inc*., 313 NLRB 902, 903 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995); *WHLI Radio*, 233 NLRB 326, 330-331 (1977)."

Under the mitigation doctrine, the General Counsel, must show that the employee refused work that was offered. Here, the General Counsel agreed with the Region in concluding that Carter would have refused the per diem work if it was offered. The facts are clear the Employer never offered the work and Carter has no idea if he would have accepted the work because he was denied the opportunity to refuse the work. See, *St George Warehouse*, 351 NLRB 961 (2007).

The General Counsel's decision incorrectly placed the burden on Carter since he was never offered any per diem position by the Hospital and therefore, he cannot say with any degree of certainty whether he would have accepted any offer of per diem work.. What can be said with certainty is that neither the Hospital nor the Union provided Carter with an opportunity to refuse the per diem work. Carter was denied any opportunity to perform per diem work by the Hospital because he was terminated. SEIU had no interest in informing Carter of his rights under the contract since SEIU initiated his termination. Neither the Employer not the SEIU informed Carter that he had any rights under the layoff provisions of the labor agreement because he was terminated.

Further, the Region never informed Carter that the simply statement meant that he was not entitled to backpay. Carter was trying to make his case to the Region that there was a regular

part time position based on the hours being worked by the per diem employee.

IV. CONCLUSION

Based on the foregoing, the Board should modify the General Counsel's decision and direct the Regional Director to reopen the case and determine whether per diem work was available to the discriminatee and whether such work opportunities would be sufficient for a part time position.

Respectfully submitted,

/s/Florice Hoffman

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